Attorney General
Betty D. Montgomery

DOCKET FILE COPY ORIGINAL

September 27, 1996

RECEIVED
SEP 30 1996
FCC MAIL ROOM

Via Overnight Mail

Federal Communications Commission
1919 M Street N.W.
Room 222
Washington, D.C. 20554

Re: *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*

Dear Ms. Myles:

Enclosed please find 20 copies of the **Petition for Reconsideration and Clarification** by the Public Utilities Commission of Ohio. Please return one file-stamped copy in the self-addressed stamped envelope.

Thank you for your assistance in this matter.

Respectfully submitted,

Betty D. Montgomery
Attorney General of Ohio

Jodi J. Bair

Jodi J. Bair
Assistant Attorney General
Public Utilities Section
180 East Broad Street
Columbus, OH 43215-3793
(614) 466-4396
FAX: (614) 644-8764

JJB/kja

No. of Copies rec'd 0+19
List A B C D E

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

RECEIVED
SEP 30 1996
FCC MAIL ROOM

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	

THE PUBLIC UTILITIES COMMISSION OF OHIO'S PETITION FOR RECONSIDERATION AND CLARIFICATION

The Public Utilities Commission of Ohio (PUCO) respectfully submits that the Federal Communications Commission (FCC) reconsider, or further clarify, some of its positions taken in the First Report and Order (Order) in this docket. By and large, the rules issued by the FCC are consistent with Ohio's guidelines regarding local exchange competition. To that extent, the PUCO commends the FCC for developing a set of rules which will foster competition in the local exchange market and in so doing, protect the public interest. In several instances, however, the rules appear to be inconsistent with the Telecommunications Act of 1996 (the Act) or are simply unclear with respect to certain details.

Aside from these various technical issues, the PUCO strongly disagrees with the FCC's jurisdictional findings, and we are well aware of the direct judicial appeals currently being pursued by the National Association of Regulatory Utility Commissioners (NARUC) and others regarding jurisdiction. The PUCO's petition for reconsideration does not address the jurisdictional issues or in no way should be construed as a request for the FCC to reconsider the jurisdictional holdings. However, Ohio fully reserves its right to appeal the FCC's order on reconsideration or to intervene or otherwise participate in pending appeals.

Duty of Non-ILECs[1] to Directly Interconnect

Section 51.100(a)(1) imposes a duty upon each telecommunications carrier to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. Section 51.305(a) imposes a duty upon incumbent local exchange carriers (LECs) to provide interconnection with its network, at any technically feasible point, for the facilities and equipment of any requesting carrier. Read in conjunction, these rules dictate an asymmetrical obligation between incumbent and non-incumbent LECs engaged in negotiations or arbitration regarding interconnection: while the incumbent has the duty to interconnect directly, the non-incumbent is obligated only to provide indirect interconnection. The PUCO observes that this obvious inequity results in inefficient and unproductive discussions between incumbents and new entrant LECs, and provides an opportunity for new entrants to negotiate in less than good faith. Non-incumbent LECs should be required to provide direct interconnection with other LECs.

The legislative Conference Report for the 1996 Act explicitly stated that the purpose of the Act is "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening *all* telecommunications markets to competition." S. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. (1996) at 1 (emphasis added). If ILECs are required to provide for direct interconnection but non-ILECs are not, this clearly is not "opening all telecommunications markets to competition." Congress envisioned an open market, with all carriers interconnecting directly with each other. By not requiring

1 "Non-ILECs" refers to Non-Incumbent Local Exchange Carriers

non-incumbents to directly interconnect with other requesting carriers, the FCC eliminates an *open* market and creates a *one-way* market. With no reciprocal direct interconnection obligation among all carriers, the advancement of information technologies and services is slowed and the market is only partially opened.

Imposition of Section 251(c) Requirements on Non-ILECs

At paragraph 1248 of the Order, the FCC concludes that states may not impose on non-incumbent LECs the obligations set forth in section 251(c) entitled, "Additional Obligations on Incumbent Local Exchange Carriers." The PUCO asserts that states should have the discretion to impose several of these obligations upon non-incumbent LECs in the interest of encouraging the utilization of an efficient public switched network. Specifically, the PUCO recommends that states have the discretion to impose a duties upon non-incumbent LECs to unbundle their networks, provide resale and provide physical collocation upon bona fide request.

The FCC provides in paragraph 1248 that the state commissions or other interested parties may ask in the future that the Commission issue a rule, in accordance with section 251(h)(2), providing for the treatment of a LEC as an incumbent LEC. However, the FCC expressly declined to exercise this authority, and stated "[a]t this time, we decline to adopt specific procedures or standard for determining whether a LEC should be treated as an incumbent LEC." Order at ¶1248. The FCC's refusal to enact any guidelines under 47 U.S.C. § 251(b)(2) should not impact the states' ability to regulate local competition. Historic police powers of the states are not to be superseded by federal enactments "unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). The critical question "is whether Congress intended that federal regulation supersede state law." *Louisiana Public Service Comm'n v. F.C.C.*, 476 U.S. 355, 368-

69 (1986). In this case, Congress expressed no clear intent that the FCC should preempt state regulation. Therefore, the states should continue to regulate local phone service in accordance with the federal Act and should have the option of imposing duties upon non-incumbent LECs to unbundle their networks and also provide physical collocation upon bona fide request.

Section 251(d)(3) of the Act provides that the FCC shall not preclude the enforcement of any regulation, order, or policy of a state commission that establishes access and interconnection obligations of local exchange carriers and is consistent with the requirements of this section. The PUCO submits that the Act itself permits states to impose additional rules as long as they are consistent with the Act. In addition, Supreme Court case law has long held that states are free to impose more stringent restrictions provided that the state rules do not stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress[.]" *Florida Avocado Growers v. Paul,* 373 U.S. 132, 141, 10 L. Ed. 2d 248, 83 S. Ct. 1210 (1963), quoting *Hines v. Davidowitz,* 312 U.S. 52, 67, 85 L. Ed 581, 587, 61 S. Ct.. 399 (1941). Taken together, the Act and case law support the states' authority to create rules imposing additional obligations on non-incumbent LECs. A recognition by the FCC of states' ability to impose such requirements will encourage more economic and efficient network deployment decisions by incumbents and new entrants alike.

By allowing states the flexibility to impose reciprocal obligations on both new entrants and incumbents, all carriers are able to share the newest technology and utilize each others efficient network, which is a stated goal of the Act. In order to promote the goal of shared technology of future innovations, the FCC bases all costing and pricing on forward-looking facilities and technologies. The FCC has determined that a forward-looking approach to costing and pricing of the unbundled network is the most appropriate manner to advance the competition envisioned by the Act. The FCC further defined the Total Element Long Run Incremental Cost (TELRIC) study to be a study which begins with the current design of the network but considers the deployment of forward looking technologies and facilities. The PUCO contends that this ideology should be extended to include the application of competitive requirements such as unbundling. If the goal of new regulation in general, and the Act specifically is to encourage the development of a competitive market that brings consumers choice, quality, and reasonable rates, then the most efficient utilization of the 'network of networks' should be encouraged. Requiring the ILEC to unbundle, resale, and offer direct interconnection only serves to reduce the non-incumbents barrier to entry. Allowing states to impose Section 251(c) requirements on all LECs will not only reduce the barriers to entry, but will greatly enhance both ILECs and Non-ILECs abilities to design efficient networks and respond directly to market demands.

One prime example is that of a cable company which enters the local telephone service market. The hybrid fiber/coaxial wire plant that such a cable company would likely use to offer telephone service is a highly efficient modern network constructed without many of the regulatory network construction requirements that the ILECs had to contend with when the ILEC network was built. Why should ILECs and other non-ILECs be denied unbundled and resell access to this highly efficient network? They should not. Requiring resale of services and unbundling this network will enhance competition, increase customer choice, and add additional pressure to all carriers to increase efficiencies in their own network.

Allowing states to impose 251(c) requirements on non-ILECs would not unduly harm new entrants. In the near-term, requests for non-ILEC resale services and unbundled network elements will likely be very minimal. However, allowing the states flexibility to impose these requirements demonstrates to non-ILECs that no one will be shielded from competition. This forces the non-ILECs to very thoroughly weigh the costs and benefits of entering the market. We should not allow the non-ILECs to create the very problematic system we are attempting to dismantle from the ILECs. In any case, just because the FCC declines to issue a rule under § 251(b)(2) at this time, that inaction does not prevent the states from imposing additional, consistent obligations on all LECs. Likewise, both the 1996 Act and general preemption case law support the conclusion that states may impose additional, consistent obligations on LECs.

Establishment of Forward-Looking Common Costs in TELRIC Studies

Section 51.505(c)(2) establishes parameters for the assessment of a reasonable allocation of forward-looking common costs. Pursuant to Section 51.505(c)(2)(B), the sum of the allocation of forward-looking common costs is to equal the total forward-looking costs, exclusive of retail costs, attributable to operating the incumbent LEC's total network, so as to provide all the elements and services offered. Although acknowledging that this requirement is theoretically sound, the PUCO submits that application of this requirement is somewhat academic and will be extremely cumbersome from an administrative perspective. Given that substantial administrative burden, the PUCO is uncertain as to whether the FCC's rule really intended to convey a narrower requirement than the language appears to reflect Ohio requests clarification and/or reconsideration of this point.

The FCC includes within its definition of "common costs" both economic costs efficiently incurred by a group of services that are not assignable to a single service or element (*i.e.*, joint costs) and such costs that may be incurred by all services of a company (*i.e.*, "pure" common costs). 47 C.F.R. § 51.505(c)(1). Because the FCC's concept of common costs include both joint costs and pure common costs, only a portion of those common costs can be allocated to a group of services or elements. Certainly, it would be less difficult to meet a requirement that only directly assignable common costs (*i.e.*, joint costs) be allocated so that the sum is equal to, or less than, the total of directly assignable costs. It is not clear whether the FCC's requirement that common costs add up to the total may have only contemplated that directly assignable (joint) common costs be added to confirm that they are not in excess of the total assignable common costs. Ohio would not object to such a requirement because it would be feasible and, in fact, Ohio's current methodology achieves that goal.

The PUCO also questions how one might implement what is referred to in paragraph 696 as one reasonable allocation method, *i.e.*, a fixed allocator such as a percentage markup, in a manner consistent with the rule regarding the sum of allocations of forward-looking common costs. Although the language in paragraph 696 suggesting that fixed markup methods (like Ohio's 10% rule) is reasonable and may have been so intended, it is currently ambiguous and cannot be relied upon with confidence. This point should be clarified.

The FCC should make clear that states have the discretion to impose a fixed allocator as a mechanism for recovering forward-looking common costs, without regard to explicit empirical proof that the sum of such allocations across network elements and services will result in the total forward-looking common costs, exclusive of retail costs, attributable to network operation. By the same token, a state's recourse to a fixed allocator should not preclude LECs from rebutting the implicit presumption that such allocator in fact results in appropriate recovery of forward-looking common costs.

Accordingly, Ohio requests that the FCC clarify its initial decision to make clear that states can utilize a reasonable fixed allocation such as a percentage markup to assign forward-looking common costs. For example, Ohio's local competition rules provide for a fixed markup of 10% of total long run incremental cost (plus joint costs) to recover common costs. Ohio would rebuttably presume that the fixed allocator recovers all common costs, allowing any party to carry the burden of rebutting that presumption by demonstrating otherwise.

On the other hand, if the FCC actually intended to rigidly require that both joint and common costs be allocated in such a way that the sum is proven not to exceed the total, the PUCO seeks reconsideration of this requirement. Complying with such a rule involves several layers of complexity, all of which are caused by the requirement that unassignable common costs be proven not to exceed the total. The methods for achieving that requirement are burdensome, tedious and imprecise.

First, the detailed exercise of calculating and applying an overall allocation of regulated and non-regulated costs would need to be performed relative to the company's common costs. Next, the difficult and arduous task of separating retail costs would need to be done. Unlike the regulated/non-regulated allocator (Part 64), there are no established accounting resources for developing a retail/non-retail allocator. This burdensome requirement is not justified by any substantial benefits and the FCC should be clear in permitting reasonable fixed allocators for common cost. Perhaps the most egregious administrative inefficiency resulting of this requirement is that it would force state commissions to litigate and decide issues not presented for arbitration. This is because state commissions would have to adjudicate all of the total and individual components of common costs for all services and elements, even though only selected ones are presented in an arbitration. This is an unduly bureaucratic and inefficient requirement.

Finally, to fully comply with § 51.506(c)(2), one must perform a stand-alone cost analysis for each service or element. This is not only a time-consuming process, but is quite speculative and academic. In reality, the stand-alone requirement is speculative and theoretical because there are really no market models of firms that provide a single service or element. It also is academic and unnecessary because a competitor or even a market-savvy customer would provide their own service if it could be provided cheaper on a stand-alone basis. If the FCC is going to rely so heavily on market forces in introducing local competition, then faith in market forces is essential and logical to rely upon.

In summary, the FCC should clarify or reconsider its requirement that common costs be allocated so that the sum of allocated costs are proven not to exceed the total common costs. In this regard, the FCC should allow states to assign a reasonable fixed markup for the recovery of common costs. A rigid requirement that unassignable common costs be allocated and added together in such a precise manner is administratively complex, and substantially burdensome, with relatively minor value or benefit.

Flat-Rate Per Port Compensation Rates

Section 51.709 of the FCC rules requires the state commissions to establish rates for transport and termination of local telecommunications traffic consistent with the rate structure established in Sections 51.507 and 51.509. Section 51.509, allows for the following: (a) local switching costs to be recovered through either flat-rated or per minutes of use (MOU) for switching matrix and for trunk port; (b) costs for shared transmission facilities between tandem switches and end offices be recovered through usage-sensitive charges, or in another manner that the ILEC incurs those costs; and (c) tandem switching costs be recovered through usage-sensitive charges, or in another manner that the ILEC incurs those costs. In addition, Section 51.507(c) allows the costs of shared facilities to be recovered in a manner that efficiently apportions costs among users, either through usage-sensitive charges or capacity-based flat-rated charges, if the state commission finds that such rates reasonably reflect the costs imposed by the various users.

Although it is not that explicit in Section 51.509 that the "other manner" the ILEC incurs those costs may be a capacity-based method, that point is explicit in Section 51.507(c). The PUCO believes that the FCC rules provides the state commissions with the flexibility in setting shared facilities (components of compensation rates for transport and termination of local telecommunications traffic) costs, by enabling the PUCO to request flat-rated reciprocal compensation rates *if* it finds that such rates reasonably reflect the costs imposed by the various users. Hence, if the PUCO found that tandem switching costs were incurred consistent with imposing a flat rate charge, the PUCO could employ flat rate or capacity-based charge.

The FCC should explicitly allow state Commissions in states that predominantly utilize flat rates to require flat-rated reciprocal compensation rates. The burden of proof should be on the ILEC to demonstrate that such flat-rated reciprocal compensation rates for the transport and termination of local telecommunications traffic rates do not reasonably reflect the costs imposed by the various users.

CONCLUSION

Accordingly, the PUCO respectfully requests that the FCC clarify and reconsider its Final Report and Order in accordance with the foregoing discussion.

Respectfully submitted,

Betty D. Montgomery
Attorney General Of Ohio

Duane W. Luckey
Section Chief

Steve Nourse

Steven T. Nourse

Jodi J. Bair

Jodi J. Bair
Assistant Attorneys General
Public Utilities Section
180 East Broad Street
Columbus, OH 43215-3793
(614) 466-4396
FAX: (614) 644-8764